Supreme Court, U.S.
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No. 95-1746

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL D. LONGSHORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a $200 application fee for a cellular system license was an unconstitutional taking if the fee exceeded the cost of processing the application.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 77 F.3d 440. The opinion of the Court of Federal Claims (Pet. App. 12-13) is unreported.

JURISDICTION

The judgment of the court of appeals was issued on February 21, 1996. The petition for a writ of certiorari was filed on April 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094 (47 U.S.C. 309(i)), Congress authorized the Federal Communica-

tions Commission (FCC) to employ a random selection process in selecting licensees for certain communication services regulated by the FCC. In 1985, Congress established a "Schedule of Charges which the Federal Communications Commission shall prescribe" for each application to participate in lotteries for various types of licenses. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 5002(f), 100 Stat. 119 (47 U.S.C. 158(g)). In particular, Congress required the FCC to charge an application fee of $200 to participate in a lottery for licenses to construct and operate domestic cellular radio systems. 47 U.S.C. 158 note (1988).[1]

Petitioner participated in the lottery for cellular radio licenses in rural service area markets (RSAs), filing 312 applications for licenses covering various RSAs. He submitted the required $200 fee with each application, for a total of $62,400, but was not successful in obtaining any licenses. Pet. App. 4. Altogether, the FCC received 288,000 applications for RSA cellular radio systems. Pet. C.A. Br. 9.

2. On July 12, 1994, petitioner filed this action against the United States in the Court of Federal Claims. He brought the action on behalf of himself and a class of all other persons or entities that paid the $200 cellular lottery application fee, alleging that the $200 fee was unreasonable because the FCC incurs costs of only approximately $20 to process each application. He claimed that to the extent the $200 fee exceeded the FCC's actual administrative

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[1] Other than adjustments to reflect periodic changes in the Consumer Price Index, the statute does not permit the FCC to vary the Schedule of Charges. 47 U.S.C. 158(b); see also 52 Fed. Reg. 5285 (1987) (Final Rule).

costs, the $200 fee constituted an uncompensated taking of private property, in violation of the Fifth Amendment to the Constitution. Pet. App. 4-5. Petitioner sought to recover the amount of each fee that exceeded the FCC's actual costs. C.A. App. 21-22.

The Court of Federal Claims dismissed the complaint for failure to state a claim. Pet. App. 12-13. In a brief opinion, it held that petitioner's voluntary participation in the cellular lottery could not possibly result in a "taking" of private property within the meaning of the Fifth Amendment, since "[a] payment made voluntarily is not a taking." *Id.* at 13 (citations omitted). The Claims Court did not address petitioner's motion for class certification. *Id.* at 6.[2]

3. The court of appeals affirmed. Pet. App. 2-11. The court of appeals held that petitioner failed to allege "a property interest that was taken from him by governmental action." *Id.* at 6. It noted that petitioner "does not claim that he had a fundamental right to access to the radio spectrum, nor could he." *Ibid.* (citations omitted). And it rejected the notion that petitioner "was 'vested' with the statutory right to participate in the lottery once the lottery system was established," explaining that "he has no preexisting right to participate in the lottery independent of payment of the statutory fee; he may only participate if he pays." *Id.* at 7. The court of appeals also reasoned that, since Congress has broad power to

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[2] In his complaint, petitioner also asserted that the allegedly excessive fee was an unconstitutional delegation of Congress's taxing authority under the Constitution's Taxation Clause (Art. I, § 8, Cl. 1). That claim was rejected by both the Court of Federal Claims and the court of appeals (Pet. App. 9, 13), and petitioner does not renew that claim here.

allocate the airwaves spectrum, and could do so by lottery, Congress could set the application fee for participation in the lottery at any level it chose. *Id.* at 8-9. In sum, the court of appeals stated:

> That asset [access to the airwaves] * * * did not belong to appellant or any other applicant, and no applicant has rights to use it until the FCC issued a proper license. Obtaining that license requires participation in a publicly held lottery for which an entry fee was charged. Congress set the fee, and the FCC collected it. Nothing in * * * takings law * * * lends even remote support to appellant's cause.

Id. at 11.

ARGUMENT

Congress has established a schedule of application fees that the FCC "shall assess and collect," 47 U.S.C. 158(a), in selecting licensees for various communication services. At the time that petitioner filed his applications for certain cellular radio system licenses, that schedule required the FCC to collect a $200 fee for each application. See 47 U.S.C. 158 note (1988). Petitioner alleges that "[t]he $200 user fee for filing cellular applications [was] unreasonable because the amount of this user fee [was] not reasonably related to, nor a fair approximation of, the costs incurred by the FCC in processing cellular applications." Pet. 4. He contends "that an unreasonable user fee constitutes a cognizable taking under established Supreme Court jurisprudence." *Ibid.*

Petitioner's contention is based on a misunderstanding of both the statutory scheme and the Fifth Amendment Takings Clause. Petitioner acknowl-

edges (Pet. 9) that, in order to state a claim under the Takings Clause, he must allege a "property interest" of his that was "taken" by government action. Petitioner has not done so. As the court of appeals correctly found, petitioner had no preexisting right to access the cellular radio spectrum or to participate in the lottery for cellular radio system licenses. Pet. App. 6-7, 11. Petitioner no longer disputes that finding. Pet. 9 (conceding that he has not been denied a "government benefit, permit or service in which he had some sort of property right"). Neither does petitioner have a cognizable property interest in any particular application fee level.[3]

Petitioner argues that the court of appeals' analysis is incorrect because it "focused its inquiry on whether [petitioner] had a property interest in the service for which he paid the user fee and not on whether [he] had a property interest in the money he used to pay the user fee." Pet. 9. If the property interest at stake in this case is petitioner's property interest in his $200, however, petitioner fails to state a claim because the government did not "take" that

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[3] Even if petitioner is correct that it costs the FCC on average only $20 to process each lottery application, there is no reason why Congress may not require the FCC to charge more for a lottery application than the actual costs of processing it. Petitioner asserts that Congress *intended* only "to recoup the costs * * * incurred in processing applications." Pet. 3 (citing legislative history). The legislative history that petitioner cites, however, states broadly that the fees are "based on [the] cost of regulation," *ibid.* (citation omitted), which may include more than mere processing costs. Cf. 47 U.S.C. 158(e). In any event, even if Congress intended only to recoup the actual costs of processing the lottery applications, and overestimated those costs when setting the fee, that would not provide petitioner with a cause of action under the Takings Clause.

$200. As the court of appeals recognized, Congress had great leeway in setting the application fee. Pet. App. 7-8. Congress decided to set the fee at $200 and petitioner chose to pay it. In return for the fee, petitioner received a chance to win a cellular radio system license. An arms-length transaction in which a person purchases a lottery chance at a pre-determined price is not a taking without just compensation.

The cases cited by petitioner, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), and *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), involve situations vastly different from that of the instant case.[4] Nothing in either *Webb's* or *Sperry* suggests that petitioner has a cognizable property interest in the government's charging no more for a cellular service lottery application than the actual cost of processing that application. Petitioner's grievance, in essence, is that he made a bad decision when he voluntarily paid an allegedly unreasonable price for the chance to participate in the cellular

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[4] In *Webb's*, this Court considered a Takings Clause challenge to a state statute permitting county courts to retain interest that accrued on interpleader funds temporarily deposited in the courts' registries. In a holding limited to "the narrow circumstances of [that] case," this Court held that a State may not, without any governmental justification, deprive claimants of their property interests in private funds temporarily held by the courts. *Id.* at 164. In *Sperry*, this Court addressed a Takings Clause challenge to a fee retroactively levied by Congress on awards previously issued by the Iran-United States Claims Tribunal to American claimants against the Iranian government. Moreover, in *Sperry* this Court upheld imposition of the fee.

service lottery. That grievance is not a takings claim.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The court of appeals decision cited by petitioner, *Marshall County Bd. of Educ.* v. *Marshall County Gas Dist.*, 992 F.2d 1171 (11th Cir. 1993), is also inapposite. In that case, the court rejected a claim by the customers of a municipal gas utility that a raise in their gas rates, enacted solely to service the utility's debt, effected a taking of private property without just compensation.